United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

B P/S ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRUIT

75-7439

NATIONAL STARCH & CHEMICAL CORPORATION,

Plaintiff-Appellee,

-against-

SS HERMIONE, her engines, boilers, etc.,
APOLLO SHIPPING CO.,

Defendants,

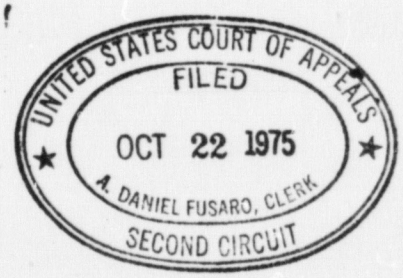
-and-

AMBER MARITIME CORP.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF



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CASES CITED:

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REPLY BRIEF OF THE DEFENDANT-APPELLANT

POINT I

THE PLAINTIFF-APPELLEE NEVER HAD A RIGHT TO INSTITUTE THIS ACTION.

The plaintiff-appellee states on page 6 of its brief in reference to the action in the Eastern District Court:

> "In that action Tapioca Associates never claimed to be the owner of the goods (97a - 101a), and never claimed for shortage or damage to the goods carried aboard the aforementioned vessel. (42a).

"In the present action National Starch bases their right to recovery on the fact that they were the owner of the goods at the time of loss (7a) and are specifically seeking recovery for shortage and damage to the goods which were in the care and custody of Amber (7a).

* * *

"In relation to these allegations it is clear that Judge Bartels (106a - 118a) never asked to determine the ownership of the cargo, and further that Tapioca Associates Inc. never claimed to be the owners of the goods at the time of the loss (97a - 101a)."

These same statements are repeated on page 16.

These statements are all erroneous. In its complaint Tapioca Associates alleged (99a):

9. On or about September 9, 1972, there was loaded on the M/V HERMIONE approximately 1022 pallets of bagged tapioca at Bangkok which the defendants agreed to carry from Bangkok to Camden, New Jersey under and pursuant to bills of lading BCD 1, 3, 4 and 6.

10. Subsequently, the defendants delivered part of the shipment to Philadelphia and part to Baltimore, not to Camden, New Jersey, in contravention of the terms of the bill of lading described in paragraph 9 of this complaint.

11. As a result of this breach of contract, the plaintiff incurred a freight differential payment, additional freight forwarding charges and other expenses for which the defendants are responsible.

12. Plaintiff has performed all obligations resting upon it under the terms of the bill of lading and all contracts existing between the plaintiff and the defendants.

Counsel for the Appellant in its affidavit opposing the transfer of this case stated: (17a - 18a)

> "In Paragraph 3 of the amended complaint of Tapioca Associates, Inc. against Amber Maritime Corp., Amber Asia Corporation and Apollo Shipping Corp. and M.V.HERMIONE, in the United States District Court for the Eastern District of New York, it is alleged:
>
> > 'The plaintiff was the owner of the cargo described below up to the time the cargo described below was picked up by the purchaser, National Starch & Chemical Corporation, ("National"), at the dock in Philadelphia, Pennsylvania and Baltimore, Maryland.' "

In its complaint in the Eastern District action Tapioca Associates sued on the same bills of lading that are involved in this case and stated that it had performed all of its obligations under the terms of the bills of lading and all contracts existing between the plaintiff and the

defendant.

The Court in its opinion assumed that Tapioca Associates owned the bills of lading and the cargo up until the time it was delivered to National Starch on the dock. The Court stated (107):

> "Under this contract National was required to accept delivery of the flour ex dock in either Philadelphia or Camden and transport it, at its own expense, to Finderne, New Jersey."

Tapioca Associates acquired the bills of lading and with them title to the tapioca when it paid the drafts to which these bills of lading were attached. National Starch never owned the bills of lading and acquired title to the tapioca only when it took delivery on the piers in Philadelphia and Baltimore. Tapioca Associates cleared the cargo with customs as the importer and owner thereof.

The Appellee cites on page 14 of its brief four cases to sustain its position. Two of these are dealt with in our main brief. The other two do not sustain its position.

In COMPAGNIE DE NAVIGATION, et al vs. MONDIAL UNITED CORPORATION, 1963 A.M.C. 946, 316 Fed.(2d) 163, the Court stated:

"True, Mondial United was neither the shipper nor the consignee. The shippers were two foreign concerns in Italy. The consignee as to each shipment was Glass Arts, Inc., a corporation having substantial relation to Florida and whose executive officer appeared as a witness and from whom decisive testimony was obtained on the liability feature. Libellant was not, however, a complete stranger to these goods. He had acted as a commission agent for the manufacturers. Under the evidence the libellant was a party to whom both shipper and consignee of the goods looked for payment for the goods, the delivery of the bills of lading, the adjustment of claims for loss or damage and the like. * * *

* * *

It stands substantially as an equitable assignee or subrogee. It is not then, the case of a mere interloper who, sustaining no damage, nevertheless recovers a substantial amount. There is at most only a risk that after payment to Mondial, the Carrier might have to pay another. But these apprehensions and those expressed in Aunt Jemima Mills Co. vs Lloyd Royal Belge, (2 Cir. 1929) 1929 A.M.C. 1141, 34 F.(2d) 120, are matters for practical determination. This danger is effectually avoided by requiring libellant on the remand of this case to make the simple showing that this item warrants.[14]".

The footnote reads:

"Within the discretion of the District Court this may be in the form of authenticated assignments, transfers, releases, or the

like from the shippers and consignees showing to the Court's reasonable satisfaction that Mondial is now the owner of all such claims, or that all others having any substantial basis for a claim have relinquished them."

In DAVID CRYSTAL, INC. vs. CUNARD S.S.Co., 223 Fed. Supp. 273, 1964 A.M.C. 1292, 1298, there is the following finding of fact:

"6. Penson was the named consignee in the bill of lading (Lib.Ex.1) and was acting as Crystal's customs broker with regard to this shipment. Crystal, as owner of the shipment, was the real party in interest and has standing to bring this action."

This means that if the person named in the bill of lading as consignee is the agent for the owner, the principal may sue upon that bill of lading.

The real test was correctly stated by Judge Swan in Aunt Jemima Mills vs. Lloyd Royal Belge, 34 Fed.(2d)120, that no matter what the allegations in the complaint were the libellant must prove its authority to bring the suit and sent the case back to the District Court to give the libellant an opportunity to produce evidence of that authority either by assignment or otherwise.

POINT II

THIS ACTION IS BARRED BY THE JUDGMENT IN THE SUIT OF TAPIOCA ASSOCIATES, INC. IN THE EASTERN DISTRICT OF NEW YORK ON THE SAME BILLS OF LADING AS THOSE ON WHICH THIS SUIT IS BROUGHT

There was one cause of action for breach of the contract of transportation. This contract is contained in the bills of lading. Tapioca Associates became the owner of these bills of lading, brought suit on them and that suit terminates any right which Tapioca Associates had under and pursuant to the terms of the bills of lading. The Appellee could acquire no rights under these bills of lading from Tapioca Associates, either legal or equitable.

CONCLUSION

It is respectfully submitted that the judgment of the District Court should be reversed and the complaint dismissed.

Respectfully submitted,

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Reply Brief

IS HEREBY ADMITTED.

DATED:

COPY RECEIVED

OCT 22 1975

HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN

Attorney for Hongaro

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